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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EXXON CORPORATION, THE BFGOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY and TENNECO CHEMICALS, INC.,

Petitioners,

vs.

ROBERT HUNT, Administrator of New Jersey Spill Compensation Fund; CLIFFORD A. GOLDMAN, Treasurer of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation; JERRY F. ENGLISH, Commissioner of Environmental Protection, and THE STATE OF NEW JERSEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does plaintiffs' complaint, which seeks to secure the enforcement of a right specifically granted to them under the federal Superfund Act, and the merits of which depend on the construction of §114(c) of that federal statute, state a cause of action arising under federal law?

Does §113(b) of the federal Superfund Act, vesting the United States District Courts with exclusive jurisdiction over controversies arising under Superfund, deprive the state courts of jurisdiction over plaintiffs' complaint and thereby render the Tax Injunction Act inapplicable?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

EXXON CORPORATION, THE BFGOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY and TENNECO CHEMICALS, INC.,

Petitioners,

vs.

ROBERT HUNT, Administrator of New Jersey Spill Compensation Fund; CLIFFORD A. GOLDMAN, Treasurer of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation; JERRY F. ENGLISH, Commissioner of Environmental Protection, and THE STATE OF NEW JERSEY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Petitioners, Exxon Corporation, the BFGoodrich Company, Union Carbide Corporation, Monsanto Company and Tenneco Chemicals, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 30, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 683 F.2d 69 (3rd Cir. 1982). The Opinion of the District Court for the District of New Jersey is unreported. A copy of the transcript of that Court's Oral Opinion is annexed to this Petition as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was made and entered on June 30, 1982 and a copy thereof is appended to this Petition as Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 9613.

CIVIL PROCEEDINGS

(a) Review of any regulation promulgated under this Act may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Except as provided in subsection (a) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies

arising under this Act, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter resulting from the assessment or collection of any tax, as provided by subchapter II of this chapter, or to the review of any regulation promulgated under Title 26.

(d) No provision of this Act shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to December 11, 1980.

42 U.S.C. §9614(c)

RELATIONSHIP TO OTHER LAW

. . .

(c) Except as provided in this Act, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State.

. . .

28 U.S.C. §1341

Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State. June 25, 1948, c. 646, 62 Stat. 932.

United States Constitution, Article VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

N.J.S. 58:10-23.11h

[Text is set forth in Appendix F.]

STATEMENT OF THE CASE

There has developed, in recent years, an increasing awareness of and concern over the damage caused by the release of hazardous substances into the environment. The need for a national approach to this problem culminated, on December 11, 1980, in the enactment of "Superfund", the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (P.L. 96-510, 42 U.S.C. §9601 *et seq.*) (Superfund). The national response effort addressed by this federal legislation, including the payment of costs of government response to hazardous waste discharges and costs incurred in compensating certain losses resulting therefrom, is funded primarily by a tax imposed on crude oil and

petroleum products and on certain chemicals, which tax is currently being paid by plaintiffs.

In order to prevent duplicative taxation of the petroleum and chemical industries for the same purposes, §114(c) of Superfund, 42 U.S.C. §9614(c), expressly preempts a state from taxing any person to cover claims, costs or damages which may be compensated under the federal act. Section 114(c) of the federal act, effective as of December 11, 1980, states as follows:

> "Except as provided in this Act, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this title. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparation for the response to a release of hazardous substances which affects such State."

Since the mid-1970's the State of New Jersey has had in effect a Spill Compensation and Control Act (N.J.S. 58:10-23.11, *et seq.*) (New Jersey Act). The New Jersey Act prohibits the discharge of petroleum and other hazardous substances in the State of New Jersey and, in addition, provides for the clean-up and removal of such discharges, the establishment of a Spill Compensation Fund, and the raising of revenue therefor by the levy of a tax upon each and every operator of a major facility involving chemical and petroleum products in New Jersey. From the inception of the Fund, 93% of the revenues collected were spent on claims relating to the clean-up and containment of hazardous substances other than petroleum. The New Jersey Act, therefore, requires op-

erators of major facilities, including plaintiffs, to contribute to a fund, the principal purpose of which is to pay compensation or claims for the costs of response or damages or claims which may be compensated under the federal law. The continuation of this requirement after the enactment of Superfund is, therefore, a clear violation of the rights and immunities granted to plaintiffs as taxpayers under §114(c) of Superfund.

On May 12, 1981, Exxon Corporation, the BFGoodrich Company and Union Carbide Corporation filed a complaint in the United States District Court for the District of New Jersey seeking a declaratory judgment that they were protected by §114(c) of Superfund from the collection of taxes imposed by the New Jersey Act. On May 29, 1981, an Amended Complaint was filed, adding Monsanto Company and Tenneco Chemicals, Inc. as plaintiffs. All five plaintiffs are national companies operating major petroleum and/or chemical facilities in the State of New Jersey.[1]

This action was brought by plaintiffs in the District Court of the District of New Jersey because §113(b) of Superfund, 42 U.S.C. §9613(b), expressly vests original exclusive jurisdiction over all cases arising under Superfund in the federal district court.[2] New Jersey moved to

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1. In accordance with the requirements of Rule 28.1, a listing naming the parent companies, subsidiaries and affiliates of Petitioner corporations appears as Appendix A.

2. On April 21, 1981, the State of New Jersey, stating it was uncertain as to the scope of preemption under §114(c), filed a lawsuit against the EPA and other government officials in the District Court for the District of Columbia seeking a declaratory judgment as to the scope of §114(c). *State of New Jersey v. United States of America*, Civil Action No. 81-0945 D.D.C. 1981. This suit was dismissed on November 10, 1981, for lack of justiciability. On April 2, 1981, a similar suit had been filed by a New Jersey legislator in the District Court of New Jersey. *Lesniak v. United States of America*, Civil Action No. 81-977 (D.N.J. 1981). This case was later consolidated with *Merlino v. United States of America*, Civil Action No. 81-

dismiss the action on the basis that the complaint was barred by 28 U.S.C. §1341. In an oral opinion rendered on July 20, 1981, Judge Meanor dismissed plaintiffs' complaint. While specifically finding that the plaintiffs' complaint arose under the federal Superfund Act, the Court determined that the language of 28 U.S.C. §1341 controlled over the language of §113(b) of Superfund, based on the application of the rule of statutory construction that where general and specific statutes apply to the same subject matter, the specific statute controls.

At Judge Meanor's urging, plaintiffs filed an expedited appeal of his decision in the United States Court of Appeals and at the same time, filed a complaint in the Tax Court of New Jersey.[3] Oral argument was presented in the Court of Appeals on March 2, 1982. On June 7, 1982, the Court requested a rehearing on the issue of whether plaintiffs' Complaint presented a claim arising under a federal statute. Thereafter, on June 30, 1982, the Court of Appeals rendered a decision affirming the District Court's dismissal of the case, based on its determination that the plaintiffs' complaint did not present a claim "arising under" Superfund because plaintiffs' declaratory request sought to establish what was, in effect, a federal defense to a purely state law enforcement action.

1914 (D.N.J. 1981). On February 22, 1982, a Stipulation of Settlement was entered into between the parties and the District Court signed an Order of Dismissal of the case.

3. On cross-motions for summary judgment, the Tax Court, on April 23, 1982, granted the State defendants' motion and dismissed all but two counts of plaintiffs' consolidated complaints. The remaining two counts were severed from the rest of the case for purposes of appeal and the decision of the Tax Court was appealed to the Superior Court of New Jersey, Appellate Division on May 7, 1982.

During the pendency of this litigation, plaintiffs have been paying the applicable federal tax on their covered products. In addition, plaintiffs have continued to pay into the New Jersey Spill Compensation Fund in accordance with its terms, since failure to pay into the Fund constitutes a misdemeanor. In the event of nonpayment of taxes, the Director of the Division of Taxation (Director) may, pursuant to *N.J.S.* 58:10-23.11h(a), summarily and unilaterally halt the release of a taxpayer's product and seize, sell or otherwise dispose of a taxpayer's product to satisfy any tax liability. Because of plaintiffs' continued compliance with the provisions of the New Jersey Act, there never has been any pending or threatened State action against plaintiffs. The position of the Director, however, is that the New Jersey tax is not preempted by the federal statute, as plainly indicated by an official Treasury Department release in the CCH Tax Report. (Appendix E).

Existence of Jurisdiction Below

The District Court for the District of New Jersey had jurisdiction over this suit under 42 U.S.C. §9613(b).

REASONS FOR GRANTING PETITION

This petition raises fundamental questions of access to the federal courts by declaratory claimants attempting to vindicate federally created rights. The decision of the Circuit Court below should be reviewed in order to clarify the issues of federal question jurisdiction left in doubt by interpretations of this Court's decision in *Public Service Comm'n. of Utah v. Wycoff Co.*, 344 U.S. 237 (1952). There now exists a clear division among the circuits as to how the standard for federal question jurisdiction which was set forth in the dictum of *Wycoff*, should be applied to a request for declaratory relief. The interpretation of *Wycoff* adopted by the Third Circuit in its decision below severely constricts the jurisdiction of the federal courts and contravenes a significant purpose of the federal declaratory judgment procedure. This interpretation, adopted as well by the Fourth, Sixth, Eighth and Tenth Circuits,[4] is in direct and explicit conflict with the interpretation of *Wycoff* now applied in the First, Fifth, Seventh and Ninth Circuits,[5] engendering confusion and divergent results throughout the federal courts which can only be resolved by this Court.[6]

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4. *See McCorkle v. First Pennsylvania Bkg. & Trust Co.*, 459 F.2d 243 (4th Cir. 1972); *Michigan Sav. & Loan League v. Francis*, 683 F.2d 957 (6th Cir. 1982); *Lawrence Cty., S.D. v. South Dakota*, 668 F.2d 27 (8th Cir. 1982); *Madsen v. Prudential Fed. Sav. & Loan Ass'n.*, 635 F.2d 797 (10th Cir. 1981), *cert. denied*, 451 U.S. 1018 (1981).

5. *See First Fed. S. & L. Ass'n. of Boston v. Greenwald*, 591 F.2d 417 (1st Cir. 1979); *Braniff Internat'l., Inc. v. Florida P.S.C.*, 576 F.2d 1100 (5th Cir. 1978); *Illinois v. General Elec. Co.*, 683 F.2d 206 (7th Cir. 1982); *Conference of Fed. S. & L. Ass'ns. v. Stein*, 604 F.2d 1256 (9th Cir. 1979), *aff'd sub nom Stein v. Conference of Fed. S. & L. Ass'ns.*, 445 U.S. 921 (1980). In addition, the Fifth Circuit's decision in the *Braniff* case, *supra*, is binding as the law of the Eleventh Circuit, under the authority of *Bonner v. City of Richmond*, 661 F.2d 1206 (11th Cir. 1981).

6. For analysis of the confusion in rationale and results now reigning among the circuits as a result of *Wycoff*, and suggestions as

results throughout the federal courts which can only be resolved by this Court.[6]

An analysis of the specific facts and actual holding of *Wycoff* makes clear the scope of its intended application. Plaintiff in *Wycoff* requested a declaratory judgment that its operations were within the stream of interstate commerce and, thereby, outside the scope of the state's regulatory authority.[7] In analyzing this request, the United States Supreme Court initially set forth the test by which the justiciability of a request for declaratory relief should be measured, quoting from the earlier case of *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937):

> " 'The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' The relief is available only for a 'concrete case admitting of an immediate and definite determination of the legal rights of the parties.' *Id.* at 240-241." *Public Service Comm'n. v. Wycoff, supra* at 243.

The Supreme Court found these factors to be missing in the plaintiff's complaint in *Wycoff*. First, the Court found that it had before it no evidence of pending or threatened state administrative action against plaintiff and since it was unclear what action, if any, the state

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to its resolution, see *Waldman, Federal Jurisdiction Over Declaratory Suits Challenging State Action*, 79 Columbia L. Rev. 983 (June 1979).

7. The plaintiff in *Wycoff* also requested injunctive relief, which the Court denied for lack of proof of immediate and irreparable harm.

would take, the suit for declaratory judgment was neither ripe nor concrete. As a result, plaintiff's request for declaratory relief was held to be premature, brought only to guard plaintiff against the possibility that the Utah Commission would, in the future, attempt to prevent or regulate its operations in some indeterminate manner. So finding, the Court concluded:

> "The carrier's idea seems to be that it can now establish the major premise of an exemption, not as an incident of any present declaration of any specific right or immunity, but to hold in readiness for use should the Commission at any future time attempt to apply any part of a complicated regulatory statute to it. If there is any more definite or contemporaneous purpose to this case, neither this record nor the briefs make it clear to us." *Id.* at 245.

The Court also noted the declaratory procedure initiated by plaintiff, which was not to protect against any immediate invasion of his rights but to obtain preliminary findings in anticipation of future state regulation, could not be used to preempt and prejudge issues committed for initial decision to a state administrative body. For these reasons, the Court held that the plaintiff's complaint in *Wycoff* lacked justiciability.

The case now on appeal arose in a factual context completely dissimilar from *Wycoff*. There is, undisputedly, a definite and concrete controversy between the parties regarding the interpretation of §114(c) of the federal Superfund Act, which affects their legal interests and is capable of specific relief of a conclusive nature. Plaintiffs have alleged in their complaint that §114(c) grants them a right protecting them from being required to contribute to a New Jersey fund the purpose of which is to pay compensation for claims which "may be compensated" under the federal Superfund Act. Plaintiffs

further allege that New Jersey's continued collection of tax revenues under the New Jersey Act is in direct violation of §114(c). New Jersey, on the other hand, has clearly enunciated an interpretation of §114(c) supporting its position that New Jersey's spill tax is not preempted by federal law, except to the extent that the federal statute preempts the State from collecting a tax the purpose of which is to pay for claims which have been *actually paid* by the federal government. The state has taken direct action in this regard by continuing to levy and collect the disputed tax from plaintiffs. If plaintiffs' position is correct, §114(c) precludes the State from subjecting plaintiffs to the New Jersey spill tax as it is now constituted. If the State is correct, it can continue to assess the tax as it has in the past for purposes which include payment of claims and damages which may also be compensated under the federal Superfund Act.

It is evident, therefore, that there exists an actual and substantial controversy between the parties of sufficient immediacy and reality to warrant declaratory relief.

In fact, the issue of justiciability has never been contested in this case. Instead, the Third Circuit below, *sua sponte*, looked to the paragraph of dictum following the actual holding in *Wycoff* as the basis for its decision denying jurisdiction in this case. In that dictum, the Supreme Court suggested that even had there been a pending or threatened state regulatory action against plaintiff to which plaintiff's declaratory judgment action was seeking to establish a federal defense, the Court would have had to look to the nature of the pending or threatened action in order to determine if federal question jurisdiction was present. The Court then stated:

> "If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a

claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law." Id. at 248.

This language has spawned a line of circuit court cases articulating conflicting interpretations of federal jurisdiction. Numerous federal courts have cited the above-quoted language of *Wycoff* as a limitation on their jurisdiction, applying this dictum to preclude federal jurisdiction of declaratory actions that raise federal constitutional challenges to state enforcement of state law, whether or not coercive action has actually been initiated against the declaratory plaintiffs in state court. Other courts have expressly rejected this reasoning, holding that the possibility that the declaratory plaintiff's constitutional claim is or may be a defense to state coercive action is not, in itself, a limitation upon the power of the federal courts to entertain the controversy.

As a concrete example of this conflict, on July 13th of this year, two weeks after the Third Circuit decided the case of *Exxon Corp. v. Hunt*, 683 F.2d 69 (3d Cir. 1982), the Seventh Circuit rendered its decision in *Illinois v. General Elec. Co.*, 683 F.2d 206 (7th Cir. 1982). In that case, the Seventh Circuit expressly disapproved of the kind of application of *Wycoff* used in *Exxon Corp. v. Hunt*. Instead, the Seventh Circuit held there to be federal jurisdiction over a preemption challenge to the Illinois Spent Fuel Act which was filed in a federal court

prior to the initiation of a state court action against the declaratory plaintiffs.

The clearest example of the conflict between the circuit courts over the application of *Wycoff* has arisen in recent cases involving preemption challenges to state statutes by federal savings and loan associations. The Sixth Circuit, in *Michigan Sav. & Loan League v. Francis*, 683 F.2d 957 (6th Cir. 1982), held that federal savings and loan associations' declaratory judgment claim that Michigan's anti-redlining statute was preempted by federal law was, in reality, a defense to a threatened enforcement of state law and, therefore, the federal court lacked federal question jurisdiction to hear the claim. A month later, in August of this year, the Sixth Circuit reaffirmed its *Francis* holding in *First Fed. S. & L. of Detroit v. Detroit Bond & Mortgage Investm. Co.*, Civil Action Nos. 80-1737, 80-1748, 80-1754, slip. op. (6th Cir. Aug. 25, 1982). See also, *Home Fed. S. & L. Ass'n. of Iowa v. Ins. Dept. of Iowa*, 571 F.2d 423 (8th Cir. 1978). These decisions are in direct and irreconcilable conflict with the Ninth Circuit's holding in *Conference of Fed. S. & L. Ass'ns. v. Stein*, 604 F.2d 1256 (9th Cir. 1979), *aff'd sub nom*, *Stein v. Conference of Fed. S. & L. Ass'ns.*, 445 U.S. 921 (1980), wherein, in exactly the same factual context, that court rejected a *Wycoff*-based challenge to federal jurisdiction and permitted the case to be litigated in federal court. See also *First Fed. S. & L. Ass'n. of Boston v. Greenwald*, 591 F.2d 417, 423 n. 8 (1st Cir. 1979).[8]

Direct conflict between the circuits is further evident in two suits which challenged the constitutionality

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8. *Madsen v. Prudential Fed. Sav. & Loan Ass'n.*, *supra*, a declaratory judgment suit challenging a state bank's policy regarding paying interest on escrowed funds, is actually distinguishable from these cases. In *Madsen*, the Court did not disapprove of the reasoning of *Stein*, but attempted to reconcile *Stein* by pointing out that

of state statutory schemes regulating interstate air carriers as violative of the Supremacy Clause. The Third Circuit, in *Allegheny Airlines, Inc. v. Pennsylvania P.U.C.*, 465 F.2d 237 (3d Cir. 1972) *cert. denied* 410 U.S. 943 (1973) held the plaintiff's suit to be solely a federal defense to a state regulatory action and, therefore, not properly within the federal court's jurisdiction,[9] while the Fifth Circuit, in *Braniff Internat'l., Inc. v. Florida P.S.C.*, 576 F.2d 1100 (5th Cir. 1978), found that the fact that plaintiff's constitutional claim *could be* a defense to a state regulatory action did not limit the power of the federal court to entertain the controversy before it.

In other areas, the Eighth Circuit, in *Lawrence Cty., S.D. v. South Dakota*, 668 F.2d 27 (8th Cir. 1982), has held that even in the absence of a threatened or pending state enforcement action, a preemption challenge to restrictions placed on the expenditure of federal entitlement funds by state regulation did not "arise under" federal law but was merely an anticipated defense to some possible state action. This reasoning cannot be reconciled with the decision of the Ninth Circuit in *Rath Packing Co. v. Becker*, 530 F.2d 1295 (9th Cir. 1975) *aff'd sub. nom., Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), *reh'g denied* 431 U.S. 925 (1977) wherein a preemption challenge to state statutes pertaining to the accuracy of weight statements on meat package labels,

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under the facts of the case before it, there was no direct conflict between the state and federal regulations concerning payment on escrowed funds. Such conflict was present in *Stein* and, of course, is present in this matter in the conflict between §114(c) of Super Fund and the New Jersey Act.

9. The Third Circuit in *Allegheny Airlines*, by way of dictum, suggested that had the airline in that case sought declaratory relief before discontinuing its air service in violation of state regulations, the federal court would have entertained the case. 465 F.2d at 243.

filed after the institution of state court action against the federal plaintiff, was held to be a viable and independent federal controversy over which the federal court had jurisdiction under 28 U.S.C. §1331.

Clearly, then, confusion reigns among the circuits as to the intended scope and application of the *Wycoff* dictum, resulting in conflicting decisions regarding access to the federal courts, even as to identically-situated claimants.

It is suggested that the most reasonable interpretation of the "test" in *Wycoff* is that the Court intended it to foreclose the possibility that the declaratory judgment procedure would be used to circumvent the established limitations on the removal jurisdiction of the federal courts, i.e., a defendant may not defeat a plaintiff's choice of a state court forum by removal of the complaint to the federal court unless a federal question appears *on the face* of the plaintiff's complaint. Removal jurisdiction, therefore, cannot be created by a defendant by raising a federal *defense* to a claim based in state law. *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908); *La Chemise Lacoste v. Alligator Co.*, 506 F.2d 339 (3d Cir. 1974), *cert. denied sub nom. Alligator Co. v. La Chemise Lacoste*, 421 U.S. 937 (1975) *reh'g denied* 421 U.S. 1006 (1975). Thus, if while a state action is threatened or pending, the defendant files a declaratory judgment action in federal court seeking relief which is a defense to the state action, such declaratory judgment action must be closely scrutinized by the court to determine if federal jurisdiction is present. Where the issue raised by the declaratory plaintiff is, in essence, an anticipatory or reiterated defense to the threatened or pending state action, which merely touches upon federal law, federal jurisdiction would not attach. If, however, an examination discloses that the declaratory plaintiff is asserting a right created by federal law, the vindication of

which rests upon the interpretation of federal law, and the declaratory complaint in and of itself is a viable cause of action, then federal jurisdiction would exist. *Rath Packing Co. v. Becker, supra* 530 F.2d at 1305-6; *Illinois v. General Elec. Co.*, 683 F.2d at 211.

Although the Third Circuit relied upon *Wycoff* in affirming the dismissal of the instant case, an examination of the declaratory request in this suit discloses that plaintiffs' complaint is in no way a device to circumvent state court jurisdiction or the limitations on removal. The *Wycoff* rationale, therefore, is inapplicable. Simply, there is not now, nor has there ever been, a pending, threatened or even contemplated enforcement action as against plaintiffs by the State of New Jersey. In fact, at the very time that plaintiffs' complaint was being filed in the District of New Jersey, the State of New Jersey was in federal court in the District of Columbia seeking a federal interpretation of §114(c) of Superfund.

On its face, plaintiffs' complaint fully satisfies the test for federal question jurisdiction set forth in *Gully v. First Nat. Bank*, 299 U.S. 109 (1936). The essential element of plaintiffs' cause of action is the allegation of a right arising under 42 U.S.C. §9614. There is a genuine and concrete controversy existing between the parties with reference to the construction of this statutory provision. Finally, this controversy is disclosed upon the face of plaintiffs' complaint, unaided by the State's answer or by any petition for removal.

Given the presence of federal jurisdiction in this case, plaintiffs' choice to proceed in a federal forum under the Declaratory Judgment Act, 28 U.S.C. §2201, asserting an independent claim based upon the Supremacy Clause and directly implicating §114(c) of Superfund, should be accorded due respect by the judiciary. *Zwickler v. Koota*, 389 U.S. 241 (1967).

In theory, plaintiffs could have attempted to initiate a state court proceeding by refusing to pay the applicable New Jersey Spill tax. Under the statutory scheme enacted by the State, however, this would have exposed plaintiffs and their employees to criminal charges, as well as monetary interest and penalties and possible ex parte seizure and sale of their goods by the Director of the Division of Taxation. This cannot be deemed to be a remedy for plaintiffs, however. *Georgia R. & Bkg Co. v. Redwine*, 342 U.S. 299, 303 n.11 (1952). In no way should the *Wycoff* dictum be expanded to overturn the long-established principle that a plaintiff is not required to violate a law he deems unconstitutional in order to obtain a hearing of his case. *Ex Parte Young*, 209 U.S. 123 (1908). As the most recent circuit court to address the issue has held:

> ". . . if [the dictum in Wycoff is] understood to require federal claimants always to litigate their claims as defenses in state court if they can, it must be wrong, and though lower federal courts have followed it from time to time the Supreme Court has not. . . . Since the impending state action will almost always be based on state law alone, the dictum, read broadly, would overrule *Ex Parte Young* and every case that has ever followed it." *Illinois v. General Electric Co.*, 683 F.2d at 211.

In conclusion, it states a mere truism to say that plaintiffs' claim under §114(c) could be raised as a defense to some state court action. The same could be said for most declaratory judgment claims which attempt to vindicate a federally-created right or immunity, including requests for declaratory relief based on claims of freedom of speech, privacy, assembly and religion. See *Zwickler v. Koota, supra; Steffel v. Thompson*, 415 U.S. 452 (1974). It should be irrelevant that plaintiff's federal preemption challenge might be asserted as a defense to a

hypothetical state-initiated enforcement action. For jurisdictional purposes, plaintiffs' affirmative claim "arises under" §114(c) of Super Fund.

Finding that plaintiffs' suit in *Exxon Corp. v. Hunt* "arises under" federal law, i.e. §114(c) of the federal Superfund Act, triggers the exclusive jurisdiction provision of §113(b) of Superfund, requiring that the case be heard in federal court.

There is sound legislative reasoning behind this unqualified choice of a federal forum for cases arising under Superfund. Superfund represents an attempt by Congress to respond in a coordinated, efficient and effective manner to the substantial national problem of the pollution of the environment by the release of hazardous substances. Given the scope of this legislation, the purpose of the exclusive jurisdiction provision in the statute is clear: to insure orderly administration and uniform interpretation of Superfund. Its purpose is to avoid fifty potentially divergent interpretations of any provision of Superfund. In this case, plaintiffs are national corporations, paying taxes in several states. If the issues raised in plaintiffs' complaint are permitted to be decided in state tax courts throughout the nation, plaintiffs could be paying taxes under as many different interpretations of §114(c) as there are state taxing statutes.

Despite the clear language of §113(b) and the strong legislative reasons behind it, the District Court below dismissed plaintiffs' complaint on the basis that 28 U.S.C. §1341, the Tax Injunction Act, conflicted with, and prevailed over, §113(b) of Superfund and, therefore, required the case to be heard in State Court.

A principal maxim of statutory construction demands that where two statutes deal with the same subject, every attempt must be made to construe them so that they are consistent with each other, as by this means

Congressional intent can be given its fullest expression. *Get Oil Out, Inc. v. Exxon Corp.*, 586 F.2d 726 (9th Cir. 1978); 2A A. Sutherland, *Statutory Construction*, §51.05 (4th Ed. 1973). Only when two statutes are in irreconcilable conflict may the statutory construction rule that a specific statute controls over a more general one be considered at all. *Panama Canal Co. v. Compania Nacional De Nav.*, 463 F. Supp. 330, 333 (D. Canal Zone 1978).

It is respectfully submitted that §113(b) and 28 U.S.C. §1341 can be harmonized so as to give full effect to the clear language and Congressional intent behind each.

28 U.S.C. §1341 is a statute of conditional application—it applies *only if* there is a plain, speedy and efficient remedy in state court. The statute was enacted because Congress became concerned about the practice of large out-of-state corporations using diversity jurisdiction to litigate the validity of state taxes in federal courts, a practice which gave them an advantage over state citizens who generally, under state law, had to pay the tax and then sue for a refund. The purpose of 28 U.S.C. §1341 was to eliminate this unfair advantage of foreign corporations over citizens of the state and to eliminate the ability of foreign corporations to withhold payment of local taxes and thereby to disrupt local financing. *Garrett v. Bamford*, 538 F.2d 63, 66 (3d Cir. 1976), *cert. denied sub nom. Bamford v. Garrett*, 429 U.S. 977 (1976).

On the other hand, §113(b) of Superfund is an unconditional jurisdictional statute specifically applicable to cases arising under Superfund. It was Congress's clear intent in §113(b) that, except for enumerated exceptions, a litigant's sole forum for institution of an action to interpret Superfund was to be in the federal district court.

The two statutes can be reconciled by recognizing that when Congress placed original exclusive jurisdiction in the federal district courts over any controversy arising under Superfund, it intended that a state remedy be no longer available to a party. If a state remedy is not available to a party litigant, the condition of §1341 has not been met and the statute is, therefore, in applicable.

Such a harmonizing construction of §113(b) of Superfund and §1341 does not distort the language or intent of either statute. It simply recognizes that when an action challenging a state tax is instituted under a statute which vests exclusive jurisdiction of such a suit in the federal courts, §1341's conditional directive does not apply. *Board of Directors of St. Francis Levee Dist. v. Kurn*, 98 F.2d 394 (8th Cir. 1938), *cert. denied*, 305 U.S. 647 (1938); *National Carriers' Conference Comm. v. Heffernan*, 440 F. Supp. 1280 (D. Conn. 1977); *Lyford v. City of New York*, 137 F.2d 782, 787 (2d Cir. 1943). This result is consistent with the rule that if two statutes cannot be reconciled, the later enacted statute (in this case, Superfund) governs. *Panama Canal Co. v. Compania Nacional De Nav.*, 463 F. Supp. at 334.

Finally, it is contended that even if a reconcilation of the two statutes is not possible, §113(b), as the specific jurisdictional provision applicable to controversies arising under Superfund, should prevail over 28 U.S.C. §1341, which deals generally with the jurisdiction of challenges made to all manner of state taxing statutes. *Cf. Hess v. Gray*, 85 F.R.D. 15, 20 (N.D. Ill. 1979).

The reasonable legislative intent of §113 is that all cases, except those enumerated in the section as exceptions, be decided by federal district courts. The areas which Congress did not want brought in the federal district courts under the original exclusive jurisdiction provision of §113(b) were excluded in §113(a) and

§113(c). Nowhere did Congress provide an exception for interpretation of the preemption provision of §114(c) which would preclude the imposition of certain state taxes, and none should now be inferred by the courts. This interpretation accords with the rule of statutory construction that where Congress explicitly enumerates exceptions to the operation of a statutory provision, additional exceptions are not to be inferred in the absence of evidence of a contrary legislative intent. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980); 2A Sutherland, §47.12 at p. 123, *supra* at 17.

CONCLUSION

The concern of the Supreme Court in *Wycoff* was "that a plaintiff not be allowed, by asserting a defense to impending or threatened state action to proceed under the fountainhead of federal court jurisdiction in a case which otherwise could not be heard in federal court." *Braniff Internat'l, Inc. v. Florida P.S.C.*, 576 F.2d at 1105. That original purpose, however, has become submerged in a semantic quagmire, in which different federal courts look at nearly identical pleadings in separate cases, one court concluding that the pleadings state a federal question, another that the pleadings state merely a defense to a state law question. The confusion among the circuits demonstrates the need for a clarification by this Court of the principle behind the *Wycoff* dictum, and for the enunciation by this Court of a workable test for applying that principle.

In addition, the determination as to whether the interpretation of §114(c) of Superfund should be relegated to a State tax court by the operation of the Tax Injunction Act is a significant question of federal law which should be decided by this court.

Respectfully submitted,

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FARRELL, CURTIS, CARLIN & DAVIDSON
Attorneys for Petitioners, Exxon Corporation, The BFGoodrich Company, Union Carbide Corporation, Monsanto Company and Tenneco Chemicals, Inc.

Dated: September 27, 1982

APPENDIX A

In accordance with the requirements of Rule 28.1 of the United States Supreme Court Rules, the following is a listing naming the parent companies, subsidiaries and affiliates of Petitioner Corporations:

Exxon Corporation directly owned affiliates operating in the United States with an ownership of less than 100%:

American Solar King Corporation; Atlas Supply Company; East Texas Salt Water Disposal Company; EOTec Corporation; Grand Ecaille Land Company, Inc.; Houston Regional Monitoring Corporation; Intecom, Inc.; Long Beach Oil Development Company; MESBIC Financial Corporation of Houston; THUMS Long Beach Company; Van Salt Water Disposal Company; Intecom, Inc.; Ramtek Corporation; Scan-Tron Corporation; Supertex, Inc.; The Zito Company, Inc.

Consolidated subsidiary companies of BFGoodrich Company with an ownership of less than 100%:

Bil Tech of California; BFGoodrich Australia Limited; BFGoodrich Chemical Limited; Industria Colombiana de Llantas, S.A.; E.P.P.C Polyplastic S.A.; BFGoodrich Chemical de Venezuela, C.A.

Domestic and foreign subsidiaries and affiliates of Union Carbide Corporation with an ownership of less than 100%:

ACM Services; P.T. Agrocarb Indonesia; Argon, S.A.; Arizona Welding Equipment Company; Bayox Inc.; Biosystemes S.A.; Calida Gas B.V.; Carbide Hashim Industrial Gas Co., Ltd.; Chemos Industries Pty. Ltd.; Chrome Corporation [South Africa] [PTY] Ltd.; CIA National De Calcareos E Derivados; Dai Nippon Jushi Co., Ltd.; Delzan Pty.

Ltd.; Electrona Carbide Industries Pty. Ltd.; Elecktrode Maatskapy Van Suid Africa (Eiendoms) Beperk; Eletromanganes Ltda.; Eletrometalurgica Saudade Ltda.; General Welding Products, Inc.; Indugas N.V.; Joint Industries (Hycel) 1970 Ltd.; La Littorale S.A.; Miami Welding Supply, Inc. Nippon Unicar Co.; Oriental Union Chemical Corp.; Oxigenio Edy S.A.; Oxigeno Del Norte, S.A.; Oy Unifos A.B.; P.T. Karmi Arafura Fisheries; Societe Gabonaise Des Ferro-Alliages; Societe Miniere De Tambao S.A.; Sony-Eveready Inc.; Svenska Viscora Aktiebolaget; Tenngasco Gas Gathering Co.; Tubatse Ferrochrome (Pty.) Ltd.; Tungsmina Desenvolvimento De Industrias Minerais Ltda.; Tungstenio Do Brasil Minerios E Metais Ltda.; Ucar Plastics Ghana Ltd.; Unifos Kemi A.B.; Union Carbide Argentina S.A.I.C.S.; Union Carbide Austria and New Zealand Ltd.; Union Carbide Austria Ltd.; Union Carbide Canada Ltd.; Union Carbide Ceylon Ltd.; Union Carbide Egypt S.A.E.; Union Carbide France, S.A.; Union Carbide Ghana Ltd.; Union Carbide India Ltd.; Union Carbide Kenya Ltd.; Union Carbide Malaysia Sdn. Bhd.; Union Carbide Mexicana, S.A.; Union Carbide New Zealand Ltd.; Union Carbide Sudan Ltd.; Union Gas Co. Ltd.; Union Industrial Gas Corp.; Union Showa K.K.; Viscora (Deutschland) G.M.B.H.; Viscora Italiana; Viscora, S.A.; Viskase Ltd.; Union Carbide Nigeria Ltd.; Union Carbide Pakistan Ltd.; Union Polymers Sdn. Bh.; Union Carbide Yemen Ltd.; Union Carbide Sudan Ltd.; Visking Do Brasil S.A.; Sociedad Anomima White Martins; S.A. White Martins Nordeste.

Domestic and foreign subsidiaries and affiliates of Monsanto Company with an ownership of less than 100%:

Fisher Controls International, Inc.; Fisher Controls Limited; Monsanto (Malaysia) Sdn. Berhad (Monaysia); Nippon Fisher Company, Ltd.; Revertex Industries (N.Z.) Ltd.; ACM Services, Inc.; Agerquim, S.A. de C.V.; Australian Fluorine Chemicals Pty. Limited (A.F.C.); Collagen Corporation; Companhia Brasileira de Estireno (CBE); Daishin Kogyo K.K.; Goyana, S.A. Industrias Brasileiras de Materias Plasticas (GOYANA); Hydrocarbon Products Pty. Ltd. (HPPL); Industrias Resistol, S.A. (IRSA); K.K. Astro Gelande; Kirbi Kasei K.K.; Korag Company Limited; Mitsubishi Monsanto Chemical Company (MMK); Nippon Cooper Kabushiki Kaisha; Plagon S.A.—Plasticos Goyana Do Nordeste (PLAGON); Plax Canada Limited [now 102975 Canada Limited]; Polyamide Intermediates Limited; Resimor Sinteticos do Nordeste S.A. (RESINOR); Rezinex Australia Limited; Ryonichi Nohken K.K.; Sankyo Kasei Sangyo K.K.; Soperton Gum Market, Inc.; Taiyo Kouyo Kabushiki Kaisha.

Tenneco Chemicals, Inc. is a wholly owned subsidiary of Tenneco Corporation, which is a wholly owned subsidiary of Tenneco, Inc. Nuodex Canada, Limited is a subsidiary of Tenneco Chemicals, Inc.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2514

Exxon Corporation, the BF Goodrich Company, and Union Carbide Corporation, Monsanto Company and Tenneco Chemicals, Inc.,

Appellants,

v.

Robert Hunt, Administrator of New Jersey Spill Compensation Fund, Clifford A. Goldman, Treasurer of the State of New Jersey, Sidney Glaser, Director of the Division of Taxation, Jerry F. English, Commissioner of Environmental Protection, and the State of New Jersey,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
(D.C. Civil No. 81-1458)

Argued March 2, 1982

Before: HUNTER, WEIS and HIGGINBOTHAM*, *Circuit Judges.*

Reargued June 7, 1982

Before: HUNTER, WEIS and BECKER, *Circuit Judges.*

Opinion filed June 30, 1982

OPINION OF THE COURT

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* Judge Higginbotham was present at the initial argument of this case but afterwards recused himself and did not participate in the decision.

WEIS, *Circuit Judge.*

Plaintiffs sought a declaratory judgment that a federal statute exempted them from a state tax. Invoking the Tax Injunction Act, 28 U.S.C. §1341 (1976), the district court dismissed the case. We find that, although it recites a federal statute, the complaint does not present a claim that "arises under" federal law. On this ground, as well as on the Tax Injunction Act, we affirm the dismissal for lack of jurisdiction.

Plaintiffs' complaint in the district court alleged that a tax levied under the New Jersey Spill Compensation and Control Act, N.J. STAT. ANN. §58:10-23.11 *et seq.* (West 1982), is "unconstitutional and preempted" by a similar federal statute, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("Superfund Act"), Pub. L. No. 96-510, 94 Stat. 2767 (1980) (to be codified in 42 U.S.C. §§9601-57). In addition, plaintiffs sought a refund of taxes collected by the state under the Spill Act after the federal statute went into effect. The district court dismissed the suit for lack of subject-matter jurisdiction because of the bar imposed by the Tax Injunction Act.

New Jersey enacted the Spill Act in 1976 to control the handling of hazardous substances within the state, require prompt cleanup, and provide compensation for associated costs and damages. N.J. STAT. ANN. §58:10-23.11a. To carry out these purposes, a Spill Compensation Fund within the state treasury is financed by a barrel tax levied upon each owner or operator of a major facility for hazardous substances. *Id.* at §58:10-23.11g, -23.11h, -23.11i.

In the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Congress also dealt with the problems caused by the release of hazardous substances into the environment. The federal Act creates

a Hazardous Substance Response Trust Fund (Superfund), 42 U.S.C. §9631, which is subsidized in part by taxes levied on crude oil, imported petroleum products, and certain chemicals. 26 U.S.C. §§4611, 4661. Section 114(c) of the Superfund Act, 42 U.S.C. §9614(c), states:

> "Except as provided in this Act, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this title."

Contending that §114(c) excuses them from paying taxes into the New Jersey Spill Fund, Exxon and the other plaintiffs sought a declaration in the United States District Court for the District of New Jersey. Jurisdiction was asserted under the federal question statute, 28 U.S.C. §1331, and §113(b) of the Superfund Act, 42 U.S.C. §9613(b), which provides that "the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act. . . ."

New Jersey moved to dismiss the suit for lack of subject-matter jurisdiction on the basis of the Tax Injunction Act: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The district judge found that New Jersey law does provide an adequate remedy and granted the motion.[1] He reasoned

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1. The New Jersey Spill Act, N.J. STAT. ANN. 58:10-23.11h(h), provides that the tax imposed shall be governed by the State Tax Uniform Procedure Law. *Id.* at §54:48-1 *et seq.* Taxpayers seeking reimbursement for alleged overpayments may file claims for refunds. *Id.* at §54:49-14. Taxpayers may also protest any finding or assessment of the Director of the Division of Taxation, request an administrative hearing from the Director, and then appeal the Director's determination to the Tax Court. *Id.* at §54:49-18; §54:2-34; §2A:3A-4.1. The Tax Court offers taxpayers a *de novo* hearing on all

that the more specific Tax Injunction Act prevailed over the Superfund Act on the question of jurisdiction and concluded that the state courts can entertain plaintiffs' preemption claim.[2]

On appeal, plaintiffs argue that the district court misconstrued the relationship between §113(b) of the Superfund Act and the Tax Injunction Act. Since §113(b) vests the district courts with exclusive original jurisdiction over cases arising under the Superfund Act, plaintiffs contend that the state courts are unable to grant any remedy. In their view, then, the Tax Injunction Act is no bar because one of the prerequisites for its application is lacking.

The Supreme Court has said of the Tax Injunction Act that "this legislation . . . reflect[s] the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation." *Fair Assessment In Real Estate Assn. v. McNary*, 50 U.S.L.W. at 4018. When a plaintiff requests a district court to grant injunctive relief against a state tax, and the state courts provide an adequate remedy, the complaint must be dismissed for lack of subject-matter jurisdiction. This is because

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issues of fact and law and is authorized to "grant legal and equitable relief so that all matters in controversy between the parties may be completely determined." *Id.* at §2A:3A-4. An appeal from Tax Court determinations may be had as of right to the Appellate division of the Superior Court of New Jersey. *Id.* at §2A:3A-4.1(c); §2A:3A-10.

2. New Jersey did not raise the eleventh amendment as a defense to the refund count in the district court or in its brief in this court. *See*, Ford Motor Co. v. Dept. of Treasury of Indiana, 323 U.S. 459 (1945). In view of our disposition of the case, we need not discuss that issue. However, we note that the Supreme Court has held that the principle of comity bars federal courts from granting a refund of local taxes in the form of damages. Fair Assessment In Real Estate Assn. v. McNary, ___ U.S. ___, 50 U.S.L.W. 4017 (No. 80-427, Dec. 1, 1981).

"[t]he Tax Injunction Act embodied Congress' decision to transfer jurisdiction over a class of substantive federal claims from the federal district courts to the state courts. . . ." *Rosewell v. LaSalle Natl. Bank*, 450 U.S. 503, 515 n.19 (1981). Although the Court once reserved the question, it is settled now that the Act prohibits declaratory as well as injunctive relief. *California v. Grace Brethren Church*, 50 U.S.L.W. 4703, 4706-07 (No. 81-31, June 18, 1982).

At the outset, it is essential to recognize that plaintiffs' attack is directed against a state tax imposed by a state statute. Plaintiffs do not challenge the Superfund Act, but rely on it as a defense against the state tax. The district judge did not quarrel with plaintiffs' allegations that this case presents a federal question and that it "arises under" the Superfund Act. We take a different view of the matter, however, and since it goes to jurisdiction we are bound to make our own determination. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 50 U.S.L.W. 4553, 4556 (No. 81-440, June 1, 1982).

We begin with 28 U.S.C. §1331: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." An action arises under federal law when "the complaint . . . requires the construction of a federal statute or a distinctive policy of a federal statute requires the application of federal legal principles for its disposition." *Lindy v. Lynn*, 501 F.2d 1367, 1369 (3d Cir. 1974). The federal question must appear on "the face of the complaint," which means that "the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense." *Gully v. First National Bank*, 299 U.S. 109, 112-113 (1936). *See also, Louisville & Nashville R.R. v. Mottley*, 211 U.S.

149, 152 (1908); *Westmoreland Hospital Assn. v. Blue Cross*, 605 F.2d 119, 123 (3d Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

In *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950), the Supreme Court observed that the Declaratory Judgment Act, 28 U.S.C. §2201, enlarged the range of remedies available in the federal courts but did not extend their jurisdiction. As a result, the Court cautioned against entertaining a declaratory complaint that did not really present a federal question on its face:

> "To sanction suits for declaratory relief as within the jurisdiction of the District Courts merely because . . . artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purpose of the Declaratory Judgment Act."

Id. at 673-74.

In *Public Service Commission v. Wycoff Co.*, 344 U.S. 237 (1952), the Court went a step further. Plaintiff there sought a declaratory judgment that it was engaged in interstate commerce. It wanted this declaration "to hold in readiness for use" should the defendant, a state agency, attempt to enforce the state's regulatory scheme against it. *Id.* at 245. The Court directed the suit to be dismissed, in language directly applicable to the case at hand:

> "In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the [state] courts. . . Where the complaint in an action for declaratory judgment

> essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. . . . Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law."

Id. at 248.

The criteria espoused by *Skelly* and *Wycoff* have been criticized, but "it seems clear that this is the law today . . ." 10 Wright & Miller, Federal Practice & Procedure §2767 at 849 (1969).[3] In *Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission*, 465 F.2d 237, 241 (3d Cir. 1972), we followed *Wycoff* and held that a complaint seeking a declaration that federal law preempted state regulations did not raise a federal question. Accord, *Lawrence County v. South Dakota*, 668 F.2d 27 (8th Cir. 1982); *Madsen v. Prudential Federal Savings & Loan Assn.*, 635 F.2d 797 (10th Cir. 1981); *Home Federal Savings & Loan Assn. v. Insurance Dept. of Iowa*, 571 F.2d 423 (8th Cir. 1978). *But see*, *First Federal Savings & Loan Assn. v. Greenwald*, 591 F.2d 417 (1st Cir. 1979); *Rath Packing Co. v. Becker*, 530 F.2d 1295 (9th Cir. 1975), *aff'd sub nom. Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (no discussion of jurisdictional issue). *See* Comment, Federal Jurisdiction Over Declara-

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3. Legislative adoption of a broader test, one that simply looks to the wording of the declaratory complaint for a federal question, has been recommended by the American Law Institute. A.L.I., Study of the Division of Jurisdiction Between State and Federal Courts, §1311 (1969). "But in view of the limited purpose that was claimed for the Declaratory Judgment Act when it was adopted, it would be a perversion of the statute if it were held to have extended federal question jurisdiction." 10 Wright & Miller §2767 at 849 (1969).

tory Suits Challenging State Action, 79 COLUM. L. REV. 983 (1979).

In summary, a declaratory judgment complaint does not state a cause of action arising under federal law when the federal issue is in the nature of a defense to a state law claim. Yet that is precisely the situation in this case. Exxon and the other plaintiffs seek a declaration that §114(c) of the Superfund Act excuses them from paying the tax imposed by the New Jersey Spill Act. In other words, they wish to establish what is in effect a federal defense to a purely state law enforcement action. *Skelly* and *Wycoff* teach us that under these circumstances federal question jurisdiction is lacking.[4]

Moreover, the Tax Injunction Act also imposes a jurisdictional bar. *California v. Grace Brethren Church*, *supra*. Exxon contends, however, that the exclusive federal jurisdiction provision of the Superfund Act removes from the state courts the power to adjudicate matters which have any connection with the federal statute, including its ban against dual taxation. Without an adequate state remedy, the Tax Injunction Act would not bar this suit. If the district court also lacks jurisdiction, Exxon argues, there is no forum open to it.

We find no merit to this contention. The Superfund Act's grant of "exclusive original jurisdiction" is limited to controversies "arising under" the statute. 42 U.S.C. §9613(b). Thus, exclusive jurisdiction is only conferred over those cases which actually present a Superfund question on the face of the complaint, not every suit in which the provisions of the Act are relevant. It does not include suits like this which challenge a state tax.

Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961), is instructive on this point. There,

4. Exxon is a New Jersey corporation and therefore diversity of citizenship was not pleaded as a basis for jurisdiction.

the Supreme Court was confronted with a challenge to a state court's jurisdiction over a suit brought to recover overcharges in the sale of natural gas. The state court defendants argued that the Natural Gas Act, 15 U.S.C. §717 *et seq.*, grants exclusive jurisdiction to the federal courts over any suit involving a rate filed with the Federal Power Commission. The Supreme Court noted, however, that "questions of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate substantive issues of federal law." *Id.* at 662. Since the plaintiff's claim was founded on state contract law, there was no federal jurisdiction. As to the "exclusive" jurisdiction conferred by the Natural Gas Act, the Court said, "[e]xclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded." *Id.* at 664.

We repeat that this suit is an attack on a state tax and nothing in the Superfund Act deprives the state courts of power to adjudicate this type of dispute. In light of the firmly established legislative policy expressed in the Tax Injunction Act, Exxon's contention that Congress impliedly removed state court authority to decide controversies over the tax imposed by the New Jersey Spill Act is simply not persuasive. *See Penn Dairies, Inc. v. Milk Control Commission*, 318 U.S. 261, 275 (1943). It is questionable whether Congress has the power to deprive a state court of jurisdiction over a non-federal party in such a state law action. *See, e.g., Healy v. Ratta*, 292 U.S. 263, 270 (1933); 1 Moore's Federal Practice §0.6[3] at 234 n.18 (1982). In any event, in light of the strong interest in federalism in circumstances like these, a displacement of state jurisdiction would not be expected in the absence of clear and explicit statutory language.[5]

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5. It is a matter of record that after the district court dismissed the complaint, plaintiffs filed suit in the Tax Court of New Jersey. No

Exxon also argues that the need for uniform interpretation of the Superfund Act is an important consideration in favor of exclusive federal jurisdiction. Although that reasoning may have influenced Congress in its decision to restrict jurisdiction over the many substantive controversies that may arise under the Superfund Act, it does not justify supplanting state jurisdiction over state laws. Indeed, the Supreme Court rejected this very argument in *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. at 665.

We conclude that the New Jersey courts retain jurisdiction to pass on the validity of the taxes imposed by the state's Spill Act, and that New Jersey law provides an adequate remedy. Since the district court did not have jurisdiction, dismissal of the plaintiff's complaint was proper and accordingly, the judgment will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

---

question of the jurisdiction of that Court has been raised by the parties or the court itself. The parties filed and argued cross-motions for summary judgment. After this case had been argued in this court, the Tax Court of New Jersey ruled on the merits of those motions, Exxon Corp. v. Hunt, Nos. SC 303A-81 and SC 319A-81TC (Tax Court of New Jersey, April 23, 1982), and Exxon has appealed.

New Jersey state legislators also brought suits in the district court to determine whether all of the New Jersey Act was preempted. Lesniak v. United States, D.C. No. 81-977. Merlino v. United States, D.C. No. 81-1914. In a settlement, the parties agreed that in several areas the New Jersey statute was not preempted by the federal act.

APPENDIX C

JULY 27, 1981 OPINION OF THE DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Before: The Honorable H. Curtis Meanor, U.S.D.J.

Appearances: Farrell, Curtis, Carlin & Davidson

By: John Carlin, Attorneys for the Plaintiffs

James R. Zazzali
State Attorney General
By: Eugene J. Sullivan, Dag,
For the Defendants

(2) THE COURT: I suppose this is a case on which I ought to write an opinion. However, the jurisdictional issue that is raised here is of considerable significance.

The case cries out for expedition so that New Jersey will know what taxes it can collect and to what end it will dedicate them. Exxon certainly has a right to know whether it's being asked to pay to New Jersey a tax that is precluded by federal law.

It is my suggestion, since I'm going to dismiss the matter for lack of subject matter jurisdiction pursuant to 28 U.S.C. Section 1341 that Exxon pursue its relief on both avenues; that it take a prompt appeal to the Court of Appeals from this decision, because before I get into this very complicated case I want to make sure that the jurisdictional base is solid.

I would suggest, that Exxon request the Court of Appeals to expedite this matter. It will permit solely a question of law on a limited record.

I would also suggest because I think the need for prompt resolution of this controversy is paramount, that while the appeal from the decision I'm entering today is pending that Exxon attempt to cooperate with the State of New Jersey and try to place this matter before the New Jersey Tax Court.

If the case comes back to me from the Court of (3) Appeals for decision it will be decided. If I am affirmed it will be a clear-cut statement that the case didn't belong here in the first place and that the only remedy that Exxon has is to litigate the issue projected by Superfund pre-emption before the New Jersey courts.

One reason I do this is the matter of judicial economy. I don't want to go through several months of litigation in a voluminous case only to find out there was no jurisdiction in the first place. That would be a disservice to the judicial system and a disservice to the parties.

By this statement, however, I do not want to be understood as having considerable doubt about the accuracy of this result. I think it is an accurate one. If I thought the other way around I would probably deny the motion and enter a 1292(b) certification so we could get appellate clarification before the complicated case gets under full meritorious sail.

The Superfund is a euphemism for the Comprehensive Environmental Response Compensation and Liability Act enacted in December 1980. It authorizes and provides for a national program for compensation of losses from hazardous waste discharges.

Section 114(c) of the Act states that no one can pay taxes for funds which duplicate the Superfund or (4) its purpose.

New Jersey has such a fund. It is collecting taxes for it from producers of oil and chemicals, and Exxon, as the

lead plaintiff in this case, brings the suit to have the state tax declared unconstitutional as pre-empted by the Superfund. It also seeks a refund of the taxes paid with interest.

28 U.S.C. Section 1341 states: "The District Court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such a state."

I think if this statute is applicable it certainly does preclude litigation in this court.

In my judgment the New Jersey Tax Court setup does provide a plain, speedy and efficient remedy. It provides a judicial or quasi judicial remedy at a trial level with a right of appeal to the Superior Court, Appellate Division, and right of discretionary review in the State Supreme Court. But since this case raises a constitutional issue I rather imagine there would be a right of appeal to the State Supreme Court in any event.

On its face, Section 1341 would preclude this suit. I think it is clear that the declaratory judgment action as well as claims for injunctive relief (5) against the assessment and collection of taxes and for refunds are precluded as well.

Section 113(b) under the Superfund Act says that: "The United States District Courts shall have exclusive original jurisdiction over all controversies arising under this Act. . . "

I have to say that on the face of it, the complaint filed by Exxon here does arise under Superfund. It lays out Superfund, lays out the New Jersey tax and says Superfund, by its terms, precludes the assessment and collection of the New Jersey tax.

The question that is posed is whether the general language of the Superfund Act conferring exclusive original jurisdiction for cases arising thereunder, is a modification pro tanto of 28 U.S.C. Section 1341.

Apparently this subject was not broached in the legislative history. I do confess I have not had a chance to review the legislative history, but both counsel tell me the effect of the general jurisdictional grant upon Section 1341 was not mentioned in the legislative history and I will, of course, accept their word for it.

I suppose there's a rather simple analysis one could go through. An axiom of statutory construction where you have a general statute and a particular statute, is that the particular statute or specific statute (6) controls.

Applying that maxim here it is obvious that 1341 would control and not the general jurisdictional grant of 113(b).

The problem that has been voiced by Exxon is that the language of 113(b) might be said to preclude state court jurisdiction over a claim arising under Superfund, claiming that the Superfund Act pre-empts the State Taxing Law.

I don't think that is so. First, as we pointed out in argument, if the state really wants to litigate this before the state taxing courts I suspect that a case could be structured whereby the problems would not arise.

Exxon could refuse to pay the tax, be sued for a judgment for the amount of taxes not paid and could defend upon the ground that th tax was pre-empted by federal law.

It would be clear under those circumstances to me that the case would not be one arising under federal law.

It seems to me silly to say the state courts can do through the back door what they can't do through the front door.

Furthermore, putting together 1341 and 113(b), it should (7) be rather obvious that state courts would not be precluded from entertaining actions arising under Superfund where the federal courts could not entertain them.

If I am right in my construction of 1341 it would seem to me that the state courts would be able to entertain a claim arising under Superfund to the extent of contention that Superfund pre-empts state taxing statutes.

The only purpose of this exclusive original jurisdictional grant to the federal courts was to see that the federal courts and federal courts alone administer the statute. Probably there was a desire to avoid conflict in the administration and construction of the statute among the federal courts, which ultimately can speak as the final authority, and the state courts.

There would be no purpose in preventing the state courts from entertaining litigation under Superfund, that would not be within the ambit of the federal court jurisdiction.

Furthermore, with respect to the state court, after all the claim that Superfund pre-empts the state taxing statute is a constitutional claim. I, for the life of me, do not know how Congress would enact jurisdictional statutes governing U.S. District Courts that would have the effect of precluding people within the (8) state court system from raising meritorious federal constitutional issues. I know of no analogy to that, I know of no authority for the statement, but it seems quite sensible to me to say that Congress could not prevent one from

asserting his federal constitutional rights as against state action within the state court system. In fact, such a doctrine would cause me extensive problems.

I am not, therefore, overly concerned with the proposition Exxon may find itself in some kind of a limbo being unable to litigate Superfund pre-emption in this court because of 1341, and by the same token being unable to litigate Superfund pre-emption in the state court because of 113(b) of the Superfund Act. I don't think the judicial system is going to tolerate putting Exxon in such an impossible predicament. So I will, therefore, dismiss the complaint in this case as precluded from adjudication here under 28 U.S.C. Section 1341.

I repeat my admonition that I think Exxon should litigate this issue before the Court of Appeals and also take steps to go before the New Jersey tax court. If the case comes back I'll decide it and I will appreciate expedition by the Court of Appeals because I think this is a significant litigation and the jurisdictional problems ought to be cleared from the underbrush before we get into this case more deeply than we have.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT
No. 81-2514

EXXON CORPORATION, THE BF GOODRICH COMPANY, AND UNION CARBIDE CORPORATION, Monsanto Company and Tenneco Chemicals, Inc.,

Appellants

VS.

ROBERT HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND, CLIFFORD A. GOLDMAN, TREASURER OF THE STATE OF NEW JERSEY, SIDNEY GLASER, DIRECTOR OF THE DIVISION OF TAXATION, JERRY F. ENGLISH, COMMISSIONER OF ENVIRONMENTAL PROTECTION, AND THE STATE OF NEW JERSEY

Defendant

(D.C. CIV. No. 81-1458)
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF
NEW JERSEY—NEWARK

PRESENT: HUNTER, WEIS AND BECKER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey—Newark and was argued by counsel March 2, 1982 and reargued before a reconstituted panel June 7, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 11, 1981, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

SALLY MRVOS
Clerk

June 30, 1982

APPENDIX E

CCH TAX REPORT STATEMENT OF DIRECTOR OF DIVISION OF TAXATION

.75—[This is in answer to the question] regarding the New Jersey Spill Compensation and Control Tax and its relation to the Federal P.L. 96-510.

It is the position of the Division [of Taxation] that the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (P.L. 96-510) does not preempt the tax which is imposed under the New Jersey Spill Compensation and Control Act (C.58:10-23.11. et seq.). We shall continue to take this position and collect tax unless a final determination by the courts is to the contrary. *Letter from Director, Division of Taxation, to Commerce Clearing House, Inc.*, May 26, 1981.

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APPENDIX F

N.J.S.A. 58:10-23.11h

TAXATION OF MAJOR FACILITIES; RATE; REFUND OR CREDIT; CLAIMS EXCEEDING FUND BALANCE; FAILURE TO FILE OR PAY TAX

a. There is hereby levied upon each owner or operator of one or more major facilities a tax to insure compensation for cleanup costs and damages associated with any discharge of hazardous substances to be paid by the transferee; provided, however, that in the case of a major facility which operates as a public storage terminal for hazardous substances owned by others, the owner of the hazardous substance transferred to such major facility or his authorized agent shall be considered to be the transferee or transferor, as the case may be, for the purposes of this section and shall be deemed to be a taxpayer for purposes of this act. Where such person has failed to file a return or pay the tax imposed by this act within 60 days after the due date thereof, the director shall forthwith take appropriate steps to collect same from the owner of the hazardous substance. In the event the director is not successful in collecting said tax then on notice to the owner or operator of the public storage terminal of said fact said owner or operator shall not release any hazardous substance owned by the taxpayer. The director may forthwith proceed to satisfy any tax liability of the taxpayer by seizing, selling or otherwise disposing of said hazardous substance to satisfy the taxpayer's tax liability and to take any further steps permitted by law for its collection. For the purposes of this act public storage terminal shall mean a public or privately owned major facility operated for public use which is used for the storage or transfer of hazardous substances.

The tax shall be measured by the number of barrels or the fair market value, as the case may be, of hazardous substances transferred to the major facility, provided, however, that the same barrel, including any products derived therefrom, subject to multiple transfers from or between major facilities shall be taxed only once at the point of the first transfer.

When a hazardous substance other than petroleum which has not been previously taxed is transferred from a major in-State facility to a facility which is not a major facility, the transferor shall be liable for tax payment for said transfer.

b. The tax shall be $0.01 per barrel transferred and in the case of the transfer of hazardous substances other than petroleum or petroleum products, the tax shall be the greater of $0.01 per barrel or 0.4% of the fair market value of the product, until the balance in the fund equals or exceeds $50,000,000.00; provided, however, that with respect to transfers of hazardous substances other than petroleum or petroleum products which are or contain any precious metals to be recycled, refined, or rerefined in this State, or which are transferred into this State subsequent to being recycled, refined or rerefined, the tax shall be $0.01 per barrel of the hazardous substance. For the purpose of this section, "precious metals" means gold, silver, osmium, platinum, palladium, iridium, rhodium, ruthenium and copper. In each fiscal year following any year in which the balance of the fund equals or exceeds $50,000,000.00, no tax shall be levied unless (1) the current balance in the fund is less than $40,000,000.00 or (2) pending claims against the fund exceed 50% of the existing balance of the fund. The provisions of the foregoing notwithstanding, should claims paid from or pending against the fund not exceed $5,000,000.00 within 3 years after the tax is first levied, the tax shall be $0.01 per barrel transferred or 0.4% of

the fair market value of the product, as the case may be, until the balance in the fund equals or exceeds $36,000,000.00, and thereafter shall not be levied unless: (1) the current balance in the fund is less than $30,000,000.00 or (2) pending claims against the fund exceed 50% of the existing balance of the fund. In the event of either such occurrence and upon certification thereof by the State Treasurer, the director shall within 10 days of the date of such certification relevy the excise tax, which shall take effect on the first day of the month following such relevy. With respect to the tax imposed upon the transfer of hazardous substances which are other than petroleum or petroleum products, if the revenues from such tax exceed $7,000,000.00 during any calendar year, such excess shall be refunded or credited to the taxpayers who paid such tax during the calendar year. The refund or credit shall be based upon the amount of taxes paid by each taxpayer on transfers of hazardous substances which are other than petroleum or petroleum products for the calendar year in proportion to all taxes paid by all taxpayers on such transfers during said year; provided, however, that if at the end of the calendar year the increased tax rate as authorized by this subsection of subsection i. is in effect, no refund or credit shall be allowed for such calendar year; and further, provided that no refund or credit shall be allowed for a calendar year if by reason of such refund or credit a condition would occur which would authorize the imposition of the tax at the higher rate authorized in this subsection or subsection i. However, a partial refund or credit shall be allowed to the extent that such a condition would not occur. In the event of a major discharge or series of discharges resulting in reasonable claims against the fund exceeding the existing balance of the fund, the tax shall be levied as follows:

(1) On petroleum or petroleum products, at the rate of $0.04 per barrel transferred, until the revenue produced by such increased rate equal 150% of the total dollar amount of all pending reasonable claims resulting from the discharge of petroleum or petroleum products; provided, however, that such rate may be set at less than $0.04 per barrel transferred if the administrator determines that the revenue produced by such lower rate will be sufficient to pay outstanding reasonable claims against the fund within 1 year of such levy; and

(2) On hazardous substances other than petroleum or petroleum products, at the rate of the greater of $0.04 per barrel transferred or 0.8% of the fair market value of such hazardous substance, until the revenue produced by such increased rate equals 150% of the total dollar amount of all pending reasonable claims resulting from the discharge of hazardous substances other than petroleum or petroleum products; provided, however, that with respect to transfers of hazardous substances other than petroleum or petroleum products which are or contain any precious metals to be recycled, refined or rerefined in this State, or which are transferred into this State subsequent to being recycled, refined, or rerefined, the tax shall be $0.04 per barrel of the hazardous substances; and provided further, however, that any such increased tax rate on hazardous substances other than petroleum or petroleum products may be set at less than $0.04 per barrel transferred, or 0.8% of the fair market value of the hazardous substance, as the case may be, if the administrator determines that the revenue produced by such lower rate shall be sufficient to pay outstanding reasonable claims against the fund within 1 year of such levy.

Interest received on moneys in the fund shall be credited to the fund. Should the fund exceed $36,000,000.00

or $50,000,000.00, as herein provided, as a result of such interest, the administrator and the commissioner shall report to the Legislature and the Governor concerning the options for the use of such interest.

c. (1) Every taxpayer and owner or operator of a public storage terminal for hazardous substances shall on or before the twentieth day of the month following the close of each tax period render a return under oath to the director on such forms as may be prescribed by the director indicating the number of barrels of hazardous substances transferred and where appropriate, the fair market value of the hazardous substances transferred to or from the major facility, and at said time the taxpayer shall pay the full amount of the tax due.

(2) Every taxpayer or owner or operator of a major facility or vessel which transfers a hazardous substance, as defined in this act, and who is subject to the tax under subsection a. shall within 20 days after the first such transfer in any fiscal year register with the director on such form as shall be prescribed by him.

d. If a return required by this act is not filed, or if a return when filed is incorrect or insufficient in the opinion of the director, the amount of tax due shall be determined by the director from such information as may be available. Notice of such determination shall be given to the taxpayer liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within 30 days after receiving notice of such determination, shall apply to the director for a hearing, or unless the director on his own motion shall redetermine the same. After such hearing the director shall give notice of his determination to the person to whom the tax is assessed.

e. Any taxpayer who shall fail to file his return when due or to pay any tax when the same becomes due, as

herein provided, shall be subject to such penalties and interest as provided in the "State Tax Uniform Procedure Law," Subtitle 9 of Title 54 of the Revised Statutes. If the Division of Taxation determines that the failure to comply with any provision of this section was excusable under the circumstances, it may remit such part or all of the penalty as shall be appropriate under such circumstances.

f. (1) Any person failing to file a return, failing to pay the tax, or filing or causing to be filed, or making or causing to be made, or giving or causing to be given any return, certificate, affidavit, representation, information, testimony or statement required or authorized by this act, or rules or regulations adopted hereunder which is willfully false, or failing to keep any records required by this act or rules and regulations adopted hereunder, shall, in addition to any other penalties herein or elsewhere prescribed, be guilty of a misdemeanor.

(2) The certificate of the director to the effect that a tax has not been paid, that a return has not been filed, that information has not been supplied or that inaccurate information has been supplied pursuant to the provisions of this act or rules or regulations adopted hereunder shall be presumptive evidence thereof.

g. In addition to the other powers granted to the director in this section, he is hereby authorized and empowered:

(1) To delegate to any officer or employee of his division such of his powers and duties as he may deem necessary to carry out efficiently the provisions of this section, and the person or persons to whom such power has been delegated shall possess and may exercise all of said powers and perform all of the duties delegated by the director;

(2) To prescribe and distribute all necessary forms for the implementation of this section.

h. The tax imposed by this act shall be governed in all respects by the provisions of the "State Tax Uniform Procedure Law," Subtitle 9 of Title 54 of the Revised Statutes, except only to the extent that a specific provision of this act may be in conflict therewith.

i. Notwithstanding any other provisions of this section, the Treasurer may order the director to levy the tax on all hazardous substances other than petroleum or petroleum products at a specified rate greater than $0.01 per barrel or 0.4% of the fair market value of the product, as the case may be, but in no event to exceed $0.04 per barrel with respect to transfers of hazardous substances other than petroleum or petroleum products which are or contain any precious metals to be recycled, refined or rerefined in this State, or which are transferred into this State subsequent to being recycled, refined or rerefined, or the greater of $0.04 per barrel or 0.6% of the fair market value of the product with respect to transfers of any other hazardous substances other than petroleum or petroleum products, if and as long as the administrator determines the following:

(1) That pending, reasonable claims against the fund for hazardous substances other than petroleum or petroleum products exceed 70% of the existing balance of the fund, and

(2) That the sum of the claims paid by the fund on behalf of discharges or removals of hazardous substances other than petroleum or petroleum products plus pending, reasonable claims against the fund on behalf of discharges or hazardous substances other than petroleum is equal to or greater than 70% of all claims paid by the fund plus all pending, reasonable claims against the fund.

The provisions of this subsection shall not preclude the imposition of the tax at the higher rate authorized under subsection b. of this section.

L.1976, c. 141, § 9. Amended by L.1979, c. 6, § 1, eff. Jan. 18, 1979; L.1979, c. 346, § 6; L.1980, c. 73, § 3, eff. July 21, 1980.

82-619

NO. 82-617

Office - Supreme Court, U.S.
FILED
DEC 1 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EXXON CORPORATION, THE B. F. GOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY and TENNECO CHEMICALS, INC.,

Petitioners,

vs.

ROBERT HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND; CLIFFORD A. GOLDMAN, TREASURER OF THE STATE OF NEW JERSEY; SIDNEY GLASER, DIRECTOR OF THE DIVISION OF TAXATION; JERRY F. ENGLISH, COMMISSIONER OF ENVIRONMENTAL PROTECTION; and THE STATE OF NEW JERSEY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS HUNT, *ET AL.*

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MARY C. JACOBSON,
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Question Presented

Do the federal district courts have jurisdiction over a declaratory judgment and refund action challenging a state tax where a plain, speedy and efficient remedy exists in state court, and where the federal claim asserted as the basis for the declaratory relief is merely a federal defense to the continuation of the state tax?

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NO. 82-617

IN THE

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Petitioners,

vs.

ROBERT HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND; CLIFFORD A. GOLDMAN, TREASURER OF THE STATE OF NEW JERSEY; SIDNEY GLASER, DIRECTOR OF THE DIVISION OF TAXATION; JERRY F. ENGLISH, COMMISSIONER OF ENVIRONMENTAL PROTECTION; and THE STATE OF NEW JERSEY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS HUNT, *ET AL.*

The Respondents, Robert Hunt, Administrator of the New Jersey Spill Compensation Fund, *et al.*, respectfully request that this Court deny the Petition for Writ of *Certiorari* seeking to review the opinion of the United States Court of Appeals for the Third Circuit reported at 683 F. 2d 69.

Statement of the Case

At issue in this case is whether a declaratory judgment and refund action challenging a state tax upon federal preemption grounds belongs in state or federal court in the first instance. The court of appeals found that state court was the proper forum in which to attack the state tax since "[t]he Tax Injunction Act embodied Congress' decision to transfer jurisdiction over a class of substantive federal claims from the federal district courts to the state courts . . .," quoting from *Rosewell* v. *LaSalle Nat'l. Bank*, 450 U.S. 503, 515 n.19 (1981) (Pa8).* In addition to relying upon the Tax Injunction Act, 28 U.S.C. §1341, however, the court of appeals found no federal jurisdiction in this case because the only federal claim asserted—Superfund preemption—was in reality nothing more than a federal defense to a state cause of action and consequently did not "arise under" federal law (Pa8 to Pa11).

This case was initiated in May 1981 when Exxon Corporation, the B.F. Goodrich Company, Union Carbide Corporation, Monsanto Company, and Tenneco Chemicals, Inc. (hereinafter "Exxon") filed a complaint against the State of New Jersey in the United States District Court for the District of New Jersey seeking: (1) a declaratory judgment that the tax levied under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 *et seq.*, was "unconstitutional and preempted" by Section 114(c) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (P.L. 96-510, 94 Stat. 2767, codified as 42 U.S.C. §9601 *et seq.*, also known as the "Superfund" Act or "CERCLA"), and (2) a refund of all tax

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* "Pa" refers to the Appendix submitted on behalf of Exxon Corporation, *et al.*, in support of the present Petition for Writ of *Certiorari*.

monies collected by the State of New Jersey from the plaintiffs under the Spill Act (N.J.S.A. 58:10-23.11h) since December 11, 1980, the effective date of the Superfund Act. Interest on the tax monies paid into the Spill Compensation Fund by plaintiffs was also sought in connection with the refund action.

All five of the plaintiffs are large national and international corporations which operate major facilities in New Jersey that utilize chemical and petroleum products.* The tax created by the Spill Act is levied upon the owners or operators of major facilities in the amount of one cent per barrel of petroleum and either one cent per barrel of hazardous substances or 0.4% of the fair market value of such substances. N.J.S.A. 58:10-23.11h(b). The taxes collected from the major facilities are used to support the Spill Compensation Fund which provides the State of New Jersey with the financial capability to implement the hazardous substance and petroleum spill prevention and control program outlined in N.J.S.A. 58:10-23.11 *et seq.* Among other things, the Spill Fund is authorized to pay spill response costs incurred by the State in protecting the public health, safety, and welfare; third party damage claims including claims for property damage or other economic loss caused by a spill; and the administrative expenses of the Spill Fund. N.J.S.A. 58:10-23.11g; N.J.S.A. 58:10-23.11o. Revenues from the Spill Act total approximately $14 million annually.

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* The Spill Act defines "major facility" as any facility that is used or is capable of being used to refine, produce, store, handle, transfer, process or transport hazardous substances and has a total storage capacity of 50,000 gallons or more for hazardous substances excluding petroleum or 400,000 gallons or more for hazardous substances of all kinds, including petroleum. N.J.S.A. 58:10-23.-11b(1).

The Spill Act specifically provides in N.J.S.A. 58:10-23. 11h(h) that the tax imposed to support the remedial purposes of the Act shall be governed by the State Tax Uniform Procedure Law, N.J.S.A. 54:48-1 *et seq.* Pursuant to the procedural mechanisms established by this Law, taxpayers seeking reimbursement for alleged overpayments may file claims for refunds. N.J.S.A. 54:49-14. Taxpayers may also challenge any finding or assessment of the Director of the Division of Taxation by filing a protest, requesting an administrative hearing from the Director, and then appealing any adverse determination rendered by the Director to the Tax Court. N.J.S.A. 54:49-18; N.J.S.A. 54:2-34; N.J.S.A. 2A:3A-4.1. The Tax Court offers taxpayers a *de novo* hearing on all issues of fact and law and is authorized to "grant legal and equitable relief so that all matters in controversy between the parties may be completely determined." N.J.S.A. 2A:3A-4. An appeal as of right from final determinations of the Tax Court is available in the Appellate Division of the Superior Court of New Jersey. N.J.S.A. 2A:3A-4.1(c); N.J.S.A. 2A:3A-10.

The Spill Act tax and the New Jersey petroleum and hazardous substance cleanup program it supports came under attack by Exxon upon the adoption of the Superfund Act. This federal legislation established a national program to combat pollution from hazardous substances, providing $1.6 billion over a five-year period to finance remedial and removal actions at the worst problem sites in the country. See 42 U.S.C. §9605(8) which directs the federal government to establish a national priority list of sites for the purpose of selecting candidates for federally financed cleanup activity. Called "a meaningful first step to address the severe threats posed by abandoned dump-sites, hazardous substance spills, leaks and releases," 126 Cong. Rec.S. 14977 (daily ed., November 24, 1980) (remarks of Senator Huddleston), the Superfund program focuses pri-

marily upon priority sites, exempts petroleum spills from coverage altogether, and does not provide compensation to private parties who incur losses due to hazardous substance releases. It consequently constitutes but a minimal first step toward the eradication of damage caused by hazardous substances—a first step limited not only by statutory constraints on coverage, but by grossly insufficient funding levels.* Despite the limited scope of the Superfund Act and the broader coverage afforded by New Jersey's spill program, Exxon claimed that the Spill Act tax was totally preempted by Section 114(c) of the Superfund Act which provides in pertinent part that:

> "Except as provided in this Act, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter." 42 U.S.C. §9614(c).

Instead of pursuing this claim against the Spill Act tax through the State tax appeal system, however, Exxon initially chose to circumvent New Jersey's tax procedures by filing a challenge to the state tax in federal district court. Although Exxon's preemption challenge to the New Jersey tax necessarily requires a construction of both a state and a federal statute and places a sensitive state taxing and

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* In regard to funding, a comment from the legislative history of S.1480—a precursor bill to the Superfund Act which proposed an appropriation of $4.1 billion for a national hazardous substance cleanup program—is instructive. In S.Rep.No. 848, 96th Cong., 2d Sess. (1979) at 17 it was noted that even an appropriation of $4.1 billion "will permit government response only to the most significant releases. At this level of funding, response will not be possible at a large number of releases posing imminent or substantial threats to public health or the environment."

environmental protection program in jeopardy, Exxon contended that only a federal court could hear its claims because Section 113(b) of the Superfund Act provided in part that "the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act . . ." 42 U.S.C. §9613(b). Since the State disagreed with this contention and believed that the strong comity and federalism concerns underlying the Tax Injunction Act barred federal district court jurisdiction over so important a local concern as the imposition and collection of the New Jersey Spill Act tax, the State moved to dismiss Exxon's complaint.

On July 27, 1981, the Honorable H. Curtis Meanor, U.S. D.J., granted the State's motion. He determined that since the New Jersey Tax Court provided Exxon with a plain, speedy, and efficient remedy for its preemption claim, the Tax Injunction Act divested the federal district courts of jurisdiction over the case. In so ruling, Judge Meanor rejected Exxon's argument that 42 U.S.C. §9613(b) supplanted state court jurisdiction over challenges to state taxing schemes alleged to be inconsistent with the Superfund Act. Rather, he concluded that the strong policy of federal noninterference in state tax matters embodied in the Tax Injunction Act took precedence over the general jurisdictional provision of the Superfund Act and required that this case be brought in state court (Pa14 to Pa19).

Exxon appealed from Judge Meanor's ruling to the United States Court of Appeals for the Third Circuit which affirmed the dismissal for lack of jurisdiction on June 30, 1982 (Pa4 to Pa13). While agreeing with Judge Meanor that the Tax Injunction Act required Exxon to bring its challenge to the New Jersey Spill Act tax in state rather than federal court, the Third Circuit also found that federal jurisdiction was lacking in this case because Exxon's

preemption claim did not "arise under" federal law. It based this latter conclusion on the fact that Exxon's complaint for declaratory relief sought merely to establish the validity of a federal defense to a state cause of action and could not, therefore, support a finding of federal jurisdiction under *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950), and *Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237, 248 (1952) (Pa9 to Pa11). Exxon filed a petition for a Writ of *Certiorari* from this decision of the Third Circuit on September 27, 1982.

While Exxon is now seeking review in this Court of the dismissal for lack of jurisdiction of its federal action challenging the Spill Act tax, it has pursued its State remedies through the New Jersey courts. On April 23, 1982, the Tax Court of New Jersey rendered a decision upholding the State tax against Exxon's preemption challenge. Exxon has since taken an appeal from that decision on the merits to the Superior Court of New Jersey, Appellate Division, where the matter is currently pending.

ARGUMENT

The Third Circuit correctly applied precedents of this Court in finding federal jurisdiction lacking to consider Exxon's challenge to the New Jersey Spill Fund tax under both the Tax Injunction Act and the *Wycoff* doctrine; since the judgment is supportable on either ground, review by this Court is unwarranted, particularly since the decisions of other circuits alleged to be in conflict with the decision below as to the proper application of the *Wycoff* doctrine are distinguishable, and review of this aspect of the case would not change the result in any event.

This case involves a direct attack upon a state tax imposed by a state statute. The opinion below thus correctly found that federal district courts were barred from hearing the matter by the Tax Injunction Act which provides that:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. §1341.

Although this statute speaks in terms of injunctions, it is now settled that the Tax Injunction Act applies to actions for declaratory relief. *California* v. *Grace Brethren Church*, 102 S.Ct. 2498, 2507 (1982). This extension of the jurisdictional bar was deemed necessary because this Court found that permitting anticipatory relief against state tax officials in the declaratory judgment context would be as intrusive as permitting it in the injunction context and would defeat the principal purpose of the Tax Injunction Act: "'to limit drastically federal district court jurisdic-

tion to interfere with so important a local concern as the collection of taxes.'" *Id.* at 2508, quoting from *Rosewell* v. *LaSalle Nat'l. Bank, supra,* 450 U.S. at 522.

The statutory bar to federal court jurisdiction created by the Tax Injunction Act has its roots in principles of federalism and comity and in the recognition of "the imperative need of a State to administer its own fiscal operations." *Tully* v. *Griffin, Inc.,* 429 U.S. 68, 73 (1976). Several recent decisions of this Court have emphasized the sensitive nature of state taxing systems and the need for federal court restraint when deciding cases that affect such systems. *California* v. *Grace Brethren Church, supra,* 102 S.Ct. at 2507-2513 (Tax Injunction Act held to divest federal district court of jurisdiction over First Amendment challenge to state unemployment insurance tax scheme); *Fair Assessment in Real Estate Ass'n.* v. *McNary,* 102 S.Ct. 177 (1982) (principle of comity invoked to bar federal courts from granting a refund of local taxes in the form of damages under 42 U.S.C. §1983); *Rosewell* v. *LaSalle Nat'l. Bank, supra,* 450 U.S. at 522 (federal jurisdiction found lacking under Tax Injunction Act to hear due process and equal protection challenge to county real estate assessments). The Third Circuit relied upon these decisions in finding that the district court had properly dismissed Exxon's declaratory judgment action challenging the New Jersey Spill Act tax.* Since these recent Supreme Court precedents amply support the result reached below under the Tax Injunction Act, review of the decision of the Third Circuit by this Court is completely unwarranted.

And, insofar as the petition seeks review of the Third Circuit determination that Supreme Court precedents also

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*There is no dispute over the conclusion that the New Jersey Tax Court procedure does offer a plain, speedy and efficient remedy to taxpayers seeking to challenge a State tax (Pa6 to Pa7).

require the dismissal of Exxon's challenge to the State Spill Act tax for failure to present a claim "arising under" federal law, review by this Court likewise is unwarranted. Since federal courts are courts of limited jurisdiction, and since "[n]ot every question of federal law emerging in a suit is proof that a federal law is the basis of the suit," *Gully* v. *First Nat'l. Bank*, 299 U.S. 109, 115 (1936), this Court has developed rules to determine the types of issues which provide a right of entry to the federal courts. Essential to a finding of federal jurisdiction is that the federal question appear on the face of the well-pleaded complaint, which means—as the court of appeals noted—that "the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense." (Pa8, quoting from *Gully, supra*, 299 U.S. at 112-113). See also *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908).

This Court has carefully scrutinized the jurisdictional limitation of the well-pleaded complaint rule in the declaratory judgment context. This caution stems from the nature of declaratory actions which allow the real position of the parties to be reversed, and from the fact that while the Declaratory Judgment Act enlarged the remedies available in the federal courts, it did not extend their jurisdiction. *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240 (1937). In *Skelly Oil Co.* v. *Phillips Petroleum Co., supra*, 339 U.S. at 672-673, the Court held that where a suit for declaratory relief merely anticipates a defense based on federal law, the action does not "arise under" federal law. Under this holding, when a plaintiff raises and responds to an expected federal defense on the face of a declaratory complaint, such "artful pleading" is insufficient to support federal jurisdiction. Rather, if careful analysis reveals that the only federal issue is

one which anticipates a federal defense to what otherwise is a state cause of action, federal jurisdiction is defeated.

The declaratory judgment context was also a source of concern to the Court in determining whether or not federal jurisdiction existed in *Public Service Commission* v. *Wycoff, Co., supra,* 344 U.S. at 248. There plaintiff filed a complaint in federal court seeking a declaration that it was engaged in interstate commerce and was consequently immune from certain state regulations. The court dismissed the case, indicating that it did not "arise under" federal law because the complaint sought only to establish a federal defense to a state cause of action for enforcement of the regulatory scheme. In support of this finding the Court stated:

> "In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the [State] courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted. Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful

> if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law." 344 U.S. at 248 (citations omitted).

This analysis has direct application to the instant case because all that Exxon is seeking through its declaratory complaint is the validation of a claim that Section 114(c) of the Superfund Act excuses it from paying the New Jersey Spill Act tax. Since this Superfund preemption claim amounts to nothing more than a federal defense to the continued collection of a state tax under state law, the Third Circuit correctly applied *Wycoff* and *Skelly* to find federal jurisdiction lacking. Plaintiffs' remedy thus clearly lies in the New Jersey courts where a decision on the merits has already been rendered and is on appeal. Further review of the decision of the court of appeals as to the absence of federal jurisdiction is therefore unwarranted.*

Exxon asserts, however, that review in this Court should be granted to resolve a conflict in the circuits as to how *Wycoff* should be applied to declaratory judgment actions.

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* It is important to note that while jurisdiction in the federal district courts is lacking under both the *Wycoff* doctrine and the Tax Injunction Act, an opportunity for review of a final state court decision addressing the merits of Exxon's preemption claim will of course be available in this Court.

The four cases cited by Exxon in support of its conflict thesis* are clearly distinguishable from the present case, however, if for no other reason than that they did not involve an established state program challenged on the basis of a *post hoc* federal enactment which did not clearly conflict with or necessarily invalidate the state program. Beyond that, the cases cited by Exxon are distinguishable from this case because of the availability of federal injunctive relief—relief unavailable in *Wycoff* and similarly unavailable here.

Such relief is not available to Exxon in the instant case because of the specific statutory bar of the Tax Injunction Act. Since the availability of injunctive relief was cited as an important consideration by circuits which distinguished *Wycoff*, rather than applying it the fact that injunctive relief is not available here severely diminishes the relevance of those decisions to this case and thereby undermines the conflict alleged by Exxon. See *Illinois* v. *General Electric Co.*, 683 F.2d 206, 209 (7th Cir. 1982); *Braniff Internat'l, Inc.* v. *Florida P.S.C.*, 576 F.2d 1100, 1105 (5th Cir. 1978). Also, one of the principal criticisms of the *Wycoff* doctrine has been its potential to restrict the thrust of *Ex parte Young*, 209 U.S. 123 (1908), which permits the Federal courts to entertain injunctive suits challenging the constitutionality of state statutes. See *Illinois* v. *General Electric Co., supra*, 683 F.2d at 209; Note, "Federal Jurisdiction Over Declaratory Suits Challenging State Action,"

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* The four cases cited by Exxon as conflicting with the decision below are: *First Fed. S. & L. Ass'n. of Boston* v. *Greenwald*, 591 F.2d 417 (1st Cir. 1979); *Braniff Internat'l., Inc.* v. *Florida P.S.C.*, 576 F.2d 1100 (5th Cir. 1978); *Illinois* v *General Elec. Co.*, 683 F.2d 206 (7th Cir. 1982); *Conference of Fed. S. & L. Ass'ns.* v. *Stein*, 604 F.2d 1256 (9th Cir. 1979), aff'd *sub nom Stein* v. *Conference of Fed. S. & L. Ass'ns.*, 445 U.S. 921 (1980).

79 Col.L.Rev. 983, 999-1000 (1979). Where Congress specifically responded to *Ex parte Young* by divesting federal courts of jurisdiction over particular kinds of challenges to state action, however, this criticism is inapplicable. *Id.* at 997-998. Since the Tax Injunction Act is one such congressional response limiting the reach of *Ex parte Young*, its availability as a jurisdictional bar in the instant case makes the applicability of the *Wycoff* doctrine by the Third Circuit all the more apt. See Note, *supra*, 79 Col.L.Rev. at 997-1001. To have held otherwise would have permitted Exxon to skirt the clear prohibition of the Tax Injunction Act.

In regard to Exxon's conflict thesis it is also important to note that although Exxon has argued that the Seventh and Ninth Circuits have rejected *Wycoff* entirely, this is not the case. Rather, these circuits have applied *Wycoff* to find federal jurisdiction lacking in cases where the factual complex presented appropriately fit within the *Wycoff* doctrine. Compare *Illinois* v. *General Electric Co.*, *supra*, 683 F.2d at 210-211, with *Nuclear Engineering Co.* v. *Scott*, 660 F.2d 241 (7th Cir. 1981) (*Wycoff* invoked to bar federal jurisdiction over declaratory challenge to threatened state enforcement action where compliance with Federal law was alleged and was found to constitute nothing more than a defense to a state cause of action); compare also *Conference of Fed. S. & L. Ass'ns.*, v. *Stein*, *supra*, 604 F.2d at 1259, with *United Air Lines* v. *Division of Indus. Safety*, 633 F.2d 814, 815-817 (9th Cir. 1980) (federal jurisdiction found lacking under *Wycoff* over challenge to California Labor Code where federal issue at most constituted only a defense to state action). Moreover, several of the circuits which have followed *Wycoff* have specifically distinguished the allegedly conflicting cases in other circuits on the facts. See, *e.g.*, *Madsen* v. *Prudential Federal Sav. & Loan Ass'n.*, 635 F.2d 797, 803-804 (10th Cir. 1981); *Michigan Sav. & Loan League* v.

Francis, 683 F.2d 957, 962 (6th Cir. 1982). Thus, there is no clear conflict among the circuits as asserted by Exxon.

The Third Circuit also correctly rejected Exxon's contention that Section 113(b) of the Superfund Act (42 U.S.C. §9613(b)) deprived state courts of the power to adjudicate a challenge to a state tax based on Superfund preemption. In support of this holding, the Third Circuit noted that the exclusive jurisdiction provision of the Superfund Act was limited to controversies "arising under" the Act and did not cover every lawsuit in which the provisions of the Act were relevant, citing *Pan American Petroleum Corp.* v. *Superior Court,* 366 U.S. 656 (1961). There the Court found that state and not federal court had jurisdiction over a contract action in which the National Gas Act had been raised as a defense, even though that Federal statute contained an exclusive jurisdiction provision. In reaching this conclusion the Court stated that:

> "'Exclusive jurisdiction' is given the federal courts but it is 'exclusive' only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded." 366 U.S. at 664.

Since Exxon's preemption claim is merely a defense to a state cause of action, it does not "arise under" the Superfund Act; consequently, Section 113(b) does not oust state court jurisdiction over Superfund preemption challenges to state taxing schemes under the rationale of *Pan American.* See also *Public Service Commission* v. *Wycoff, supra,* 344 U.S. at 248.

In addition, the court below correctly rejected Exxon's contention that Congress impliedly removed state court authority to decide challenges to the New Jersey Spill Act tax when it adopted the Superfund Act. In fact, the Third Circuit found this particular claim totally unsupportable when viewed against the strong legislative policy of The Tax Injunction Act which specifically endorses state court jurisdiction over State tax matters. This holding is clearly in keeping with the recent pronouncements of this Court emphasizing the importance of the policies underlying The Tax Injunction Act. See *California* v. *Grace Brethren Church, supra,* 102 S.Ct. 2507-2511; *Fair Assessment in Real Estate Ass'n* v. *McNary, supra,* 102 S.Ct. at 179; *Rosewell* v. *LaSalle Natl. Bank, supra,* 450 U.S. at 515. If Congress had intended to abrogate the Tax Injunction Act, then, it would—as the Third Circuit observed—certainly have done so in clear and explicit statutory language. The silence of the Superfund Act on this point thus further undermines Exxon's claim that Section 113(b) impliedly repealed the Tax Injunction Act. See *Radzanower* v. *Touche Ross & Co.,* 426 U.S. 148, 153-154 (1976); *Watt* v. *Alaska,* 451 U.S. 259 (1981); *Penn Dairies* v. *Milk Control Commission,* 318 U.S. 261, 275 (1943). Since the Third Circuit holding correctly gives precedence to the Tax Injunction Act over the general jurisdictional provision of the Superfund Act, review of the decision below by this Court is not warranted on this issue either.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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